Supreme Court, U.S.
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No. 92-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

DAVID T. JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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VS.

DAVID T. JORDAN,
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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

I.

The Questions Presented For Review Have Been Properly Raised and Preserved Throughout The Course of This Case

When Respondent, David T. Jordan ("Jordan") first offered evidence of Petitioner Clayton Brokerage Co. of St. Louis, Inc.'s ("Clayton") financial condition during the trial of this case, Clayton objected to the admission of *any* such evidence. Tr. p. 972, lines 11-17. (App. A). After making that objection, Clayton's counsel further argued that if Clayton's objection were overruled, Jordan should be limited to offering evidence of

Clayton's shareholder's equity, and precluded from reading to the jury the value of Clayton's assets or the footnote to Clayton's financial statement concerning its contingent liabilities. Tr. p. 972, lines 18 to p. 973, line 21. (App. A).

In the colloquy between the trial court and counsel that followed, Clayton's counsel stated Clayton's position that

> the imposition of punitive damages in a civil action under the present language of the jury instructions and the present standards on burden of proof, so forth, violates the constitutional rights of the defendant.

Tr. p. 980, line 25 to p. 981, line 3. The trial court was advised that Clayton's position was explained further in Clayton's motion for a directed verdict at the close of plaintiff's case. Tr. p. 980, lines 19-24. (App. A).

Clayton's written motion for a directed verdict was taken up by the trial court a short time later. Clayton's counsel then expanded on the constitutional underpinnings of Clayton's objection to submitting the claim for punitive damages to the jury, explaining

> that submitting the issue of punitive damages to the jury would deprive defendant of its constitutional rights, deprive defendant of due process under the Fourteenth Amendment to the U.S. Constitution and to its rights under the Fifth Amendment of the U.S. Constitution.

Tr. p. 1005, lines 20-25. The trial court asked for further elaboration, prompting the following discussion between counsel:

> [Clayton's Counsel]: [T]he basic argument is that the issue of punitive damages as framed in this civil action deprives the defendant of its constitutional rights, in that any penalty or punishment to be made against this defendant should only occur in a criminal or quasi-criminal

proceeding which involves a higher burden of proof than is imposed in this case.

The basic argument is that, therefore the defendant's due process rights are deprived. Further, that any punishment or penalty against this defendant should be carried out by the proper federal regulatory agency which at the present time is the Commodity Futures Trading Commission, and that —

[Jordan's Counsel]: Just for a point of clarification can I — are you making a separate argument on preemption now?

[Clayton's Counsel]: Yes, tied in that the preemption of the federal statutes and regulations allows punishment and penalty against a brokerage firm, such as Clayton Brokerage, and that, therefore applying punishment or penalty in a civil action deprives Clayton of its constitutional rights.

Tr. p. 1006, line 11- p. 1007, line 7.

This record clearly belies Respondent's assertions (a) that "Clayton expressly consented to admission" of evidence of Clayton's net worth (Resp. Br. at 2); (b) that Clayton's objection to the evidence was "founded solely on the Equal Protection Clause" with no "'Due Process' objection to the use of the net worth evidence" having been made (Resp. Br. at pp. 2-3); (c) that the preemption issue was first raised when Clayton filed its Petition for a Writ of Certiorari in Case No. 88-1483 (Resp. Br. at p. 5); and (d) that Clayton deliberately defaulted on the issue of preemption. (Resp. Br. at 14).[1]

---

[1] Clayton did not press the preemption issue before either the trial court or the panel of the court of appeals which heard Clayton's initial appeal because those courts were both bound to follow the Eighth Circuit's prior decision in *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984). *See*

(Footnote 1 continued on next page)

After the jury rendered its verdict, Clayton moved for a new trial, asserting as grounds therefore, among other things, the excessiveness of the punitive damage award. Clayton specifically argued in its new trial motion that the punitive damage award bore no reasonable relationship to the injury inflicted as measured by the compensatory damage award. *See* Memorandum in Support of Defendant Clayton Brokerage Company of St. Louis, Inc.'s Motion to Set Aside the Verdict, at page 7. (App. C).

These fundamental propositions which Clayton laid before the trial court — that the punitive damage award was excessive in relationship to the actual damage award and was rendered by a jury which improperly received evidence of Clayton's net worth and was permitted to award punitive damages based on the preponderance of the evidence — have formed the bases for Clayton's contention that the punitive damage award should be vacated at each successive stage of review. *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 861 F.2d 172, 174, 177 (8th Cir. 1988); *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 975 F.2d 539, 541, 542 (8th Cir. 1992). Moreover, once the case was presented to this Court, which has the authority to overrule the court of appeals' precedent on the issue of preemption, Clayton

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(Footnote 1 continued)

United States v. Lewellyn, 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard*, 706 F.2d 267, 269 (8th Cir.) *cert denied* 464 U.S. 934 (1983). In fact, upon remand from the court of appeals, the trial judge confirmed that he would have refused to consider the preemption argument had it been pressed at trial because he was constrained to follow the *Kerr* decision. *See* Transcript of Proceedings on October 2, 1991 at page 4. (App. B). Under these circumstances, Clayton's effort to avoid wasting judicial resources by not pressing an issue before a court in which the outcome was predetermined can hardly be interpreted as a "deliberate default" prohibiting Clayton from presenting the issue for consideration to this Court, which has the power to overrule that precedent.

vigorously pressed its argument that Jordan's common law claims had been preempted by the CEA.[2]

Whether or not Clayton articulated its arguments in the same way at each stage of review is not dispositive of whether the errors to which Clayton's arguments are addressed have been properly preserved for review by this Court. Even where a petitioner's invocation of particular constitutional principles is inexplicit, the issues are preserved for review by this Court if they are within the clear intendment of Petitioner's contentions. *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599, 98 L.Ed. 967, 977, 74 S.Ct. 757 (1954)(error preserved although petitioner invoked the commerce clause rather than the due process clause of the Constitution).

Throughout this case Clayton has clearly and repeatedly made the same contentions it now makes: that the punitive damage award is excessive in relationship to the compensatory damage award, that the jury was improperly permitted to hear evidence of Clayton's net worth and to decide the punitive damage claim based on the preponderance of the evidence, and that the state law which authorized the award of punitive damages is preempted. Jordan's conclusion that these questions are "barred" by "procedural defaults" (Resp. Br. at 29) is simply wrong.[3]

[2] In fact, upon remand from the court of appeals, Clayton moved the trial court to vacate the punitive damage award on the grounds that Jordan's common law claims were preempted. However, the trial court refused to consider Clayton's motion.

[3] With respect to the preemption issue, Jordan's waiver arguments are misplaced for the additional reason that the Eighth Circuit has fully considered the legal issues in the *Kerr* case, and has thus provided the Court with an ample basis on which to evaluate its reasoning regarding the preemption question. Jordan makes no contention that any further development of the record is needed in this case for the Court to adequately address these legal issues. *See Kiefer-Stewart v. Seagram*, 340 U.S. 211, 215 (1951)(no reason to refuse to hear issue on appeal on grounds of waiver when issue presented is purely legal and requires no further examination or appraisal of evidence).

II.

The Eighth Circuit Explicitly Refused to Consider Whether The Process By Which The Punitive Damage Award Was Rendered Afforded Clayton Due Process of Law

Jordan's assertion that the court of appeals complied with this Court's Order in Case No. 88-1483 by "ex gratia" providing Clayton "a full *Haslip* review" (Resp. Br. at 7) is refuted by the court of appeals' own opinion. Therein, the court stated:

> Finally, Clayton argues that the punitive damages award must be vacated because it does not comply with the due process requirements set out in *Haslip*. ... We ... exercise our discretion against reaching these constitutional claims.

Clayton Brokerage Co. of St. Louis, Inc. v. Jordan, 975 F.2d at 542-43.

The *Haslip* decision "shed new light on the law" so that, "if it had been available at the time of the court of appeals' [initial] decision, [it] might have led to a different result." *See Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978)(Stevens, J., dissenting). This Court's order remanding this case for reconsideration in light of *Haslip* certainly should have suggested to the court of appeals that *Haslip* was sufficiently analogous to this case, and potentially decisive of the issues presented by Clayton, as "to compel re-examination of the case." *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964); Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed.), § 5.11(b) at 280. The court of appeals' explicit refusal to address Clayton's constitutional claims demonstrates that it failed to properly re-examine the case.

III.

The Question of the CEA's Preemption of Common Law Causes of Action Is One Of Substantial Importance Which Should Be Addressed By This Court

Finally, Jordan argues that, despite its earlier decision to grant Clayton's Petition in its entirety, this Court should now refuse to consider the important question of whether the CEA preempts common law causes of action because of an alleged "longstanding judicial consensus" among the lower courts that such claims are not preempted. Jordan's argument is belied by the number of cases in which courts have struggled with this issue. *See* Clayton's Petition at footnote 13.[4] There is thus a clear need for

[4] Moreover, there is a clear divergence of opinion over the effect of Congress' repeal of the savings clause which the Court in *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247 (1947) found prevented preemption of state law. Although a number of courts have relied on the opinions of commentators, such as Phillip Johnson, concerning Congress' intent to occupy the field of commodity futures regulation, a contrary intent was clearly expressed by Senator Curtis, who introduced Section 402(d) of the CFTC Act on the Senate floor:

> MR. CURTIS. Mr. President, I understand that the intent of the bill is to grant exclusive jurisdiction over commodity futures trading to the new commission, except to the extent the bill specifies that other Federal and State agencies and Federal and State courts are to retain jurisdiction. However, as I understand it, *it is also the intent of the bill that, even in the cases where the State agencies and State courts retain jurisdiction, the Federal substantive law embodied in the Commodity Exchange Act as amended by the bill would preempt the field completely*, so that, if any substantive State law were contrary to or inconsistent with Federal law, the Federal law would govern.
>
> Section 4c of the existing Commodity Exchange Act contains the following sentence:
>
> "Nothing in this section or Section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections."

(Footnote 4 continued on next page)

guidance on this issue from this Court. Therefore, the Court should grant Clayton's Petition for Certiorari in its entirety, and should finally determine whether common law remedies are preempted by the CEA.

IV.

Conclusion

In granting certiorari in *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 3400 (Nov. 30, 1992), the Court recognized that the lower courts require further guidance in applying the principles announced in *Haslip*. While the issues presented in this case are not dissimilar from those which the

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(Footnote 4 continued)

> All of the transactions referred to in the sentence are covered by the existing act as amended by the bill. *In order to assure that Federal Preemption is complete, I believe that the sentence I quoted should be deleted from the Act.*

120 Cong. Rec. 30464 (Sept. 9, 1974) (emphasis added). Jordan can point to nothing in the legislative history which would support his contention that Congress had any purpose in repealing the savings clause other than that expressed by Senator Curtis.

Court will consider when it hears *TXO*, the case presents other issues which merit the Court's attention as well. For these reasons, the Court should grant Clayton's Petition for a Writ of Certiorari to resolve these issues.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

Kansas City, Missouri
November 10, 1987

DAVID T. JORDAN,
Plaintiff,

vs.

CLAYTON BROKERAGE COMPANY,
of ST. LOUIS, INC.,
Defendant.

TRANSCRIPT ON APPEAL

VOLUME IV (Pages 940-1135)
BEFORE THE HONORABLE D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE, and a jury.

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* * *

[Page 972 Lines 11-25]

* * *

THE COURT: Any objection if they read those portions of Exhibit 48?

MR. COWDEN: Yes, Your Honor. First of all, we object to reading any portion of the consolidated statement of financial condition of Clayton for the reason that our position is that a submissible case on punitive damages has not been made.

If the Court determines that a submissible case on punitive damages has been made, then we object to any reference to the total assets and total liabilities of the company.

Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury. We would further object to any reference to any other figure

[Page 973 Lines 1-21]

or wording on the consolidated statement of financial condition. Specifically, we object to plaintiff's proposed reading of the contingent liabilities paragraph.

I don't — that is one that I don't believe there is any support whatsoever in the case law for allowing plaintiff's counsel to read such a statement to the jury concerning contingent liabilities, the opinion of management, based upon consultation with

their outside counsel about contingent cases which are not identified specifically and it would lead to — could lead to defendant having to put on evidence about, I suppose about every other contingent liability in the form of a legal action that is presently pending against the company to explain what was meant by that statement, and the basis for that statement.

Of course, it is hearsay and an opinion contained within a hearsay statement. So our position is, even if punitive is submissible under the law of Missouri, and the law and practice of the 8th Circuit, that only one figure, that of total stockholders' equity should be read to the jury.

* * *

[Page 980 Lines 17-24]

* * *

THE COURT: Mr. Cowden, do you want to say anything about that:

MR. COWDEN: I might advise the Court that at the time we file our Motion for Directed Verdict at the close of plaintiff's evidence, that we intend to argue to the Court, among the other reasons stated in that motion, that a submissible case on punitive damages has not been made under the evidence presented.

* * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
THE HONORABLE D. BROOK BARTLETT, JUDGE

No. 82-1107-CV-W-9
October 2, 1991
Kansas City, Missouri

Civil

DAVID T. JORDAN,
Plaintiff,

vs.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Defendant.

TRANSCRIPT OF PROCEEDINGS

On Wednesday, the 2nd day of October, 1991, the above-entitled cause came on regularly for hearing before the HONORABLE D. BROOK BARTLETT, Judge of the United States District Court for the Western District of Missouri, sitting in Kansas City.

APPEARANCES

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* * *

[Page 3 Lines 16-25]

* * *

MR. KNICKMEYER: Thank you, Your Honor. Your Honor, as we perceive this matter there are three issues before the Court. First of all, does Missouri's law relating to punitive damages pass constitutional muster? Secondly, was the award of punitive damages rendered against Clayton Brokerage in this case an award which, of itself, can pass constitutional muster? And thirdly, whether or not the award is permissible because the Commodity Exchange Act preempts the state law which

[Page 4 Lines 1-25]

would allow the award of punitive damages in this case.

THE COURT: That issue foreclosed, isn't it?

MR. KNICKMEYER: Your Honor, I don't see it as being foreclosed. I think that when the Supreme Court accepted our petition for certiorari, without limiting the issues that were accepted for a cert, the Supreme Court indicated that that was an open issue.

I do agree with Your Honor that under the traditional rules that would apply in the 8th Circuit there is a controlling precedent in the 8th Circuit, the Kerr v. First Commodity Corp. case, which would ordinarily constrain Your Honor. In light of the unique history of this case, however, I think that that constraint is no longer what it might be. And, frankly, Your Honor, we are

arguing for a change in the law of the 8th Circuit in that regard and we think that it ought to be considered.

If it's —

THE COURT: Let's — we can dispose of that pretty quickly. I am obligated to follow the law of the 8th Circuit. I don't think it's my job to try to change the law in view of the clear precedent in the 8th Circuit. Now, you can argue that in front of the 8th Circuit, obviously, and they can change their view. But

[Page 5 Lines 1-7]

I don't think I'm authorized to. And furthermore, I don't think I'm authorized to under the limited basis on which I have this case.

So I think — I mean, unless you've got some reason why you think that I can deviate from a clearly applicable precedent in the 8th Circuit, I think my obligation is to follow that precedent.

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

DAVID T. JORDAN,
Plaintiff,

v.

CLAYTON BROKERAGE COMPANY
OF ST. LOUIS, INC.,
Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC.'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986 AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

* * *

[Page 7]

III. The Punitive Damage Award Bears No Relationship to the Injury Inflicted on Plaintiff.

Under Missouri law, the amount of punitive damages awarded "must have some reasonable relationship to injury inflicted." *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981); *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666, 669 (Mo. App. 1971). In the present case, the amount of punitive damages awarded bears no relationship to the injury inflicted. The award is wholly out of line with awards in similar cases and with the particular circumstances of this case.

* * *